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IN THE

United States Supreme Court

2004 TERM

SANJAY SARDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Petitioner denied due process of law when convicted of violating the parental kidnapping statute (18 U.S.C. § 1204) if, when he traveled to India with his daughter, he possessed equal custodial rights with his wife, violated no custody award, commenced a custody proceeding in the Indian courts on notice to his wife, and returned the child to the United States as previously intended at his own expense?

2. Was Petitioner denied due process of law when the District Court directed a verdict concerning an element of the crime?

3. Was Petitioner denied due process of law and a fair trial when the District Court denied defense counsel's request to instruct the jury on "reliance on counsel" defense to rebut the element of obstructive intent?

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OPINION BELOW

On June 16, 2004, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming Petitioner's judgment of conviction (*United States v. Sanjay Sardana*, 101 Fed. Appx 851 [2nd Cir. 2004]). Application for re-hearing *en banc* was denied on July 29th, 2004.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 29 U.S.C. § 1254(i). The Petition has been filed in a timely manner, pursuant to Rule 13(3).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1204 States: International Parental Kidnapping

(a) Whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section—

(1) the term "child" means a person who has not attained the age of 16 years; and

(2) the term "parental rights," with respect to a child, means the right to physical custody of the child—

(A) whether joint or sole (and includes visiting rights); and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be affirmative defense under this section that—

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence;

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances with 24 hours after the visitation period has expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

Federal Rules of Criminal Procedure

Rule 52(a) of the Federal Rules of Criminal Procedure states:

> "Any error, defect, irregularity or variance which does not affect substantial rights, shall be disregarded."

Issues Presented

(1) whether in the absence of a court order or written agreement between the parties, a biological father can transport his child out of the United States and thereafter promptly commence a custody proceeding in India on notice to, and with his wife's participation make the child available for visitation, and still be convicted of parental kidnapping (18 U.S.C. § 1204)

(2) whether the trial judge over objection can direct a verdict concerning an element of the crime (*i.e.*, custodial rights);

(3) whether a "reliance on counsel" defense was properly precluded from the Court's charge where sought to rebut the element of obstructive intent?

STATEMENT OF FACTS

Background

Petitioner Sanjay Sardana was convicted of parental kidnapping in violation of 18 U.S.C. § 1204 following a jury trial in the United States District Court, Eastern District of New York (Glasser, J.), and was sentenced to serve a 10-month term of imprisonment, 5 months in a

Bureau of Prisons facility, and 5 months in home confinement. He is at liberty on bail pending appeal granted by a Panel of the United States Court of Appeals for the Second Circuit. He has been directed to self-surrender to a Bureau of Prisons-designated facility on September 20th, 2004 to serve the initial 5-month imposed term of imprisonment.

The Trial

At the trial, the jury heard testimony indicating that Petitioner and his estranged wife, Parul Sardana, were living separately when Petitioner and his daughter, Siena, traveled to India—a country where the parties had their wedding reception, and strong family ties. There was no custody order in place at the time of the trip, nor concededly was one ever introduced in evidence at any point in the trial; under New York law, each was deemed an appropriate custodial parent.

Subsequent to arrival in India, Petitioner commenced a custody proceeding on notice to his wife, subject to United States and Indian civil law. She subsequently appeared before the Indian courts with counsel. She was afforded access to their daughter both by telephone, and in person. Ultimately, prior to a final determination, a private agreement was reached (T-212-213) (A-129-130)[1], and Petitioner returned to the United States with his daughter, as intended from the outset, at his own expense, and surrendered. No custody order or agreement addressing custody was introduced in evidence, or claimed to have been violated.

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[1] Parenthetical references are to the trial transcript (T) and appellate appendix (A).

The Court's Charge

Following closing argument by counsel, Judge Glasser charged the jury on the law. Defense counsel excepted to the Court's ruling that, as biological mother, Parul Sardana had the right to sole physical custody until said right was terminated (T-260). The Court also denied defense request with respect to Request to Charge #2 to instruct the jury on "reliance on counsel" (T-263), as well as the operative New York State statutes, including on sole or joint as further elaborated on in the renewed Rule 29 motion at the conclusion of the entire case.

The Sentence

Judge Glasser sentenced Petitioner to a ten-month term of imprisonment, consisting of five months in custody, and 5 months of home confinement.

The Appeal

A Panel of the Court of Appeals applied *United States v. Amer*, 110 F.2d 873 [2d Cir. 1997] as a precedential basis for affirming the conviction. The summary order dated June 16th, 2004 is annexed hereto (A-1). The Court of Appeals declined to re-hear the appeal *en banc* (A-1).

REASONS FOR GRANTING THE PETITION

POINT I

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT DEFENDANT OF PARENTAL KIDNAPPING BECAUSE NO CUSTODY ORDER WAS FLOUTED AND HE DID NOT ACT WITH OBSTRUCTIVE INTENT.

Petitioner Sanjay Sardana was convicted of violating 18 U.S.C. § 1204, even though the Government's proof at trial failed to establish:

(1) a court award of custody to his wife;

(2) that he failed to reasonably notify his wife of his whereabouts and commencement of a custody proceeding;

(3) that he denied his wife access to the child.

The proof at trial demonstrated that:

(1) Petitioner promptly moved in a court of competent jurisdiction seeking to obtain joint legal and physical custody;

(2) he remained in India, pending a resolution of initiated court action;

(3) he made the couple's daughter available for communication and visitation; and

(4) he returned to New York with his daughter as intended from the outset.

This Court has never reviewed a Section 1204 conviction. The existing cases generally involve flouted court orders, or *ex parte* litigation commenced in distant forums where the allegedly injured party is not on equal footing. In *United States v. Amer*, 110 F.3d 873 [2d Cir. 1997], an Egyptian citizen removed the marital children in late January, 1995 to Egypt. Importantly, in February, 1995 the wife:

(a) sought a court award of custody;

(b) obtained legal custody by court order;

(c) obtained a court arrest warrant; and

(d) lost custody of her children under Egyptian law who were left behind abroad.

Here, Parul Sardana did not have, nor did Petitioner ever fail to honor, a court order. Indeed, no court order was *ever* introduced on the Government's case. Moreover, in *Amer*, the children were kept away from the mother throughout the charged time period. Here, by contrast, Petitioner returned to the jurisdiction with the child as planned from the outset. Accordingly, a threshold question is whether *Amer* should be extended to cases which lack proof of a court custody order. We submit that it should not.

The most recent case involving Section 1204 is *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40 [1st Cir. 1/21/04] which addressed the legal insufficiency question. It is, however, we respectfully submit, significantly distinguishable.

Circuit Judge Howard's opinion carefully noted both a marital history replete with threats by Defendant, and a vigorous campaign of covert surveillance of his wife's activities. Defendant took the children with him to India.

Importantly, his wife thereafter *promptly* obtained an emergency custody order in the Massachusetts Probate Court, of which Defendant was subsequently apprised. He then apparently moved *ex parte* for custody in the courts in Nagpur, India (*see United States v. Fazal-Ur-Raheman-Fazal*, *supra*, pages 42-43).

This differs from *Sardana*, in which there was no State Court order which Petitioner flouted, nor was the foreign litigation conducted *ex parte*. Rather, Parul Sardana vigorously litigated in the Indian courts, and had access to her daughter, Siena. She never sought custody at any time prior to Petitioner's trip to India.

We believe that this case provides a needed opportunity to address whether the wife's bare possession of parental rights which are in no way superior to those of Petitioner, *without* a court order or operative custody agreement, is sufficient to violate Section 1204, *and* whether a defendant's subsequent custody litigation on notice to the complaining spouse defeats a claim of obstructive *mens rea*. The Panel decision, to which this Petition is addressed, noted that the motivation for litigation in India was his belief he would receive "fairer treatment" in India than in the courts of Brooklyn, New York (T-226-27). We dispute, and the Panel decision provides no legal support for the conclusion, that proceeding from that assumption was sufficient to support a finding of "obstructive intent." We submit that fewer parental rights does not mean less rights, or less favorable, taken in proper context in light of full testimony. What Petitioner sought was an equitable (50/50) custody arrangement.

A fair reading of Section 1204, against this backdrop, reveals that the mere alleged failure to yield to complainant's "parental rights" does not, standing alone, vio-

late the statute. Rather, this must occur with an "obstructive intent." We submit that, while a unilateral removal might well, from complainant's perspective, be viewed as a dimination of her "parental rights," Petitioner's commencement of litigation in the Indian courts on notice surely belies any intent to unlawfully obstruct. Foreign "forum shopping" may offend some, but can it truly be said to arise to the level of obstruction of justice?

We live in a time when many feel that the role of the federal government has inappropriately intruded itself into matters customarily long thought to be local matters to be resolved in the State Courts. The sought extension of Section 1204 to a case which lacks a civil custodial order, and which ignores Petitioner's initiated custody litigation on appropriate notice to the estranged spouse, extends Section 1204 to situations unforeseen, we submit, by the statute's drafters, and certainly not clearly encompassed by the present statute on its face (*see e.g., United States v. Sun Diamond Growers of California*, 526 U.S. 398, 412-13 [1999]).

This Court should review this case to definitively interpret the proper application of the parental kidnapping statute, for if there is ever to be a case reviewed under this statute, this would have to be it as contrasted with all the other petitions presented to the Court, over the past eleven years, which have been denied because of a flouted court order. There has, we note, never been a reported case of an individual possessing equal parental rights being convicted where no court order or agreement was proven to have been violated. The panel decision fails, we submit, to respect Congress's "strong intention" preferring that civil remedies be used to resolve difficult custody cases (Remarks of President Clinton in signing the Parental Kid-

napping Bill into law (*see* 4 U.S.C.C.A.N. P. 2424 [12/6/93]).

Moreover, to the extent that the First Circuit's opinion in *Fazal-ur-Raheman-Fazal*, *supra* involved a Massachusetts State court order (albeit one obtained subsequent to Defendant's trip) which was violated, whereas none was in *Sardana*, there is a "conflict between the circuits" which warrants review by this Court.

POINT II

MULTIPLE ERRORS AND OMISSIONS IN THE COURT'S CHARGE LESSENED THE GOVERNMENT'S BURDEN OF PROOF AND DEPRIVED DEFENDANT OF A FAIR TRIAL

Any review of a trial judge's jury charge commences with a two-fold recognition:

(1) The trial court is prohibited from directing a verdict on any element of the crime charged (*see Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106 [1986]; *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 [2000]; and

(2) The charge must be appropriately "balanced" to insure that the jury is given both an appropriate, and dispassionate, explanation of the operative legal principles (*United States v. Bright*, 517 F.2d 584, 587 [2d Cir. 1975]; *United States v. Dove*, 916 F.2d 41, 45-46 [2d Cir. 1990]).

A. The Removal of an Element of the Crime

With respect to the first concern, it is clear that Judge Glasser unilaterally removed the issue of "parental rights" from jury consideration, and did so in a manner which failed to accord *any* status to Defendant's rights, or to note the possible significance of a court custody order. It is clear that this constitutes constitutional error (*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 [1977]; *Connecticut v. Johnson*, 460 U.S. 73, 84 [1983]).

That having been noted, the next question is whether the error was "harmless" within the meaning of Rule 52(a) of the Federal Rules of Criminal Procedure[2]. Any such analysis commences with the recognition that the burden of proof rests with the Government (*In re Winship*, 397 U.S. 358, 361-64 [1970], *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 1778 [1993]). A Defendant carries no burden to establish a custody award to himself. Judge Glasser's comments at transcript page 220, relative to the absence of a court having affirmatively authorized Petitioner to "do it," (travel to India with Siena) surely suggested to the jury that the Defendant had a burden of proof which he failed to carry.

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[2] Because trial counsel objected in a timely fashion, this is not a case falling under the "plain error" rule found in Rule 52(b) of the Federal Rules of Criminal Procedure (*e.g., United States v. Fazal-Ur-Raheman-Fazal, supra, accord United States v. Whab*, 355 F.3d 155, 158-59 [2d Cir. 2004]) (reviewing Judge Saris' charge under plain error). Both judges Saris and Glasser acted in a manner which treated custody rights much like District Judges treated the concept of "materiality" prior to *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 [1995]. This approach concededly no longer passes constitutional muster.

In the context of a case in which each party possessed custodial rights no less worthy than the other (*see* New York Domestic Relations Law § 70[3] and 236[4]), and where no custody order was flouted, the Court's charge had the decided effect of structurally altering and reducing the Government's burden of proof (*see United States v. Sun Diamond Growers of California, supra, cf. United States v. Neder*, 527 U.S.1, 119 S.Ct. 1827, 1833 [1999]) (*Gaudin* error can be found harmless). This was not a harmless omission, and is contrasted with harmless error claims based upon a mere "inadvertent" omission to charge a statutory element. Here, the jury was told that the element had been proven. The portion of the panel's decision which addresses custodial rights fails to explain the appropriateness of removing an element of the crime charged after this Court's rulings (see e.g., *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313-2316 [1995]).

B. Reliance Upon Counsel

Additionally, the Court's charge became even less balanced and less fair when it refused to charge the jury on Defendant's theory of defense—reliance upon the advice of his counsel (*see e.g., United States v. Crowley*, 236 F.3d 104,110-111 [2d Cir. 2000]).

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[3] Section 70 states: "In all cases, there shall be no *prima facie* right to the custody of the child in either parent. . ." *see also Braiman v. Braiman*, 44 N.Y.2d 584, 589, 407 N.Y.S.2d 449, 450 [1978]).

[4] New York Domestic Relations Law § 236, Part B, ¶(e) defines "custodial parent" as a parent to where custody of a child. . . is granted by a valid agreement of the parties, or an order of the Court." The panel's summary order, we submit, fails to respect the custodial rights of the father as equal (e.g. *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2060-61 [2000]).

Here, reliance upon the advice of counsel is a recognized aspect of a jury charge ("Modern Federal Jury Instructions," Section 8.04 [Siffert & Sand, Matthew Bender], and "Federal Jury Practice and Instructions," § 19.06 [O'Malley, Greenig, etc. 2000])—particularly in the context of a case where obstructive *mens rea* is an element of the offense which must be found beyond a reasonable doubt. The failure to so charge, particularly in light of the directed verdict on another element, we submit, requires reversal (*United States v. Dyer*, 922 F.2d 105, 107-08 [2d Cir. 1990]) in the context of a trial involving a specific intent statute—one requiring proof of "obstructive intent" (*e.g., United States v. Duncan*, 850 F.2d 1104, 1115-1119 [6th Cir. 1988]; *United States v. Platt*, 435 F.2d 789, 790-792 [2d Cir. 1970, per Friendly, J.]).

The core issue in *Sardana* was one of intent. Petitioner attempted to present an appropriate basis for acquittal by arguing that he acted in reliance upon the advice of counsel (a U.S. legal consultant (Indian attorney) obtained from the U.S. Embassy website in New Delhi). His belief, if honestly held (even if viewed as objectively unreasonable), would have justified an acquittal (*Cheek v. United States*, 498 U.S. 192, 202-03 [1991]).

The case which the panel relied upon, *United States v. Remini*, 967 F.2d 754,757 [2nd Cir. 1992], involved a contempt conviction for refusal to testify at a trial in the Brooklyn Federal Court after being directed to do so by the trial judge. We do not dispute that a lawyer's alleged advice cannot trump a clear direction by the trial judge. In *Sardana*, however, no judge's order was violated, and Petitioner's reliance on legal advice appropriately impacted upon the element of "obstructive intent."

The issue of the appropriateness of giving a "reliance on counsel" charge is surely an issue of law, in the context of a specific intent charge, which this Court should review (see *Williamson v. United States*, 207 U.S. 425, 453 [1908]). Petitioner was no less entitled than Williamson to have his intent appropriately evaluated by a jury's consideration of the legal advice upon which he relied in good faith.

This Court has not addressed the appropriateness of such a legal instruction *vis a vis* a specific intent crime. In this complex age in which we live, its parameters cry out for legal definition.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED, THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT VACATED, AND THE CASE REMANDED FOR APPELLATE REVIEW CONSISTENT WITH THIS COURT'S RULING.

Dated: New York, New York
September 14, 2004

Respectfully submitted:

/s/

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

No. 03-1742
Filed: June 16, 2004

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 16th day of June, Two Thousand and Four.

PRESENT: HON. JOSEPH M. MCLAUGHLIN,
HON. REENA RAGGI,
Circuit Judges,
HON. RICHARD J. HOLWELL,*
District Judge.

* The Honorable Richard J. Holwell of the United States District Court for the Southern District of New York, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

SANJAY R. SARDANA,

Defendant-Appellant.

APPEARING FOR APPELLANT:

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APPEARING FOR APPELLEE:

ADAM M. ABENSOHN, Assistant United States Attorney (Susan Corkery, Assistant United States Attorney, *on the brief*), *for* Roslynn R. Mauskopf, United States Attorney, Eastern District of New York, Brooklyn, New York.

SUMMARY ORDER

Appeal from the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court's judgment of conviction, entered on December 4, 2003, is AFFIRMED.

Defendant-Appellant Sanjay Sardana was convicted after a jury trial of removing his three-year old daughter from the United States and retaining the child in India for several months with the intent to obstruct the lawful exer-

cise of parental rights by the child's mother, his estranged wife, in violation of the International Parental Kidnapping Crime Act ("IPKCA"), *see* 18 U.S.C. § 1204. Sardana now appeals from the judgment of conviction pursuant to which he was sentenced principally to a five-month term of imprisonment followed by five months of home detention, execution of which sentence has been stayed pending this appeal. We assume familiarity with the record and proceedings before the district court and hereby affirm the judgment.

1. *Sufficiency of the Evidence*

Sardana asserts that the trial evidence was insufficient to establish his guilt with respect to two aspects of the charged crime: his wife's parental rights and his own obstructive intent. A defendant raising a sufficiency challenge to his conviction bears a heavy burden because a reviewing court must affirm if the evidence, viewed in its totality and in the light most favorable to the government, *see United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002), would permit any rational jury to have found the essential elements of the crime beyond a reasonable doubt, *see United States v. Gaskin*, 364 F.3d 438, 459-60 (2d Cir. 2004). Applying these principles to Sardana's case, we conclude that the evidence amply supported conviction.

Specifically, we reject Sardana's argument that his wife's parental rights had to be proved through a court custody order. Section 1204 defines "parental rights" as the right to physical custody of a child, whether joint or sole, that can arise by court order, by agreement, *or* "by operation of law." 18 U.S.C. § 1204(b)(2). In determining what parental rights arise by operation of law, federal courts look to state law. *See United States v. Amer*, 110 F.3d 873, 878 (2d Cir. 1997); *see also United States v. Fazal-Ur-Rahe-*

man-Fazal, 355 F.3d 40, 45 (1st Cir. 2004). Under New York law, the application of which is undisputed in this case, "there is no confusion" that "the biological mother [ ] enjoys the right to physical custody of her children unless and until this right is terminated by law." *United States v. Amer*, 110 F.3d at 878. Thus, the government was not obliged to offer proof of a court custody order to secure Sardana's conviction; it could rely on established New York law.

We similarly reject Sardana's contention that the evidence was insufficient to prove his obstructive intent in light of his post-abduction notification to his wife that he had taken their child to India and his commencement of custody proceedings in that country. As we explained in *United States v. Amer*, 110 F.3d at 881-82, the IPKCA was enacted to deter one parent from removing a child from the United States to another country that is not a signatory to the Hague Convention in order to obstruct the rights of the other parent. It is no defense to such conduct that *after* unlawfully removing the child from the United States, a defendant commences legal proceedings in the foreign forum. *See id.* at 882 (noting that the defendant is limited to affirmative defenses provided in 18 U.S.C. § 1204(c)); *see also United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 43, 46 (affirming § 1204 conviction of defendant who, after absconding with child to India, notified wife of travel to that country and filed court custody action). At trial, Sardana admitted that his reason for surreptitiously taking his daughter to India was the expectation that the courts of that country would accord his wife fewer parental rights than the courts of New York. Trial Tr. at 226-28. By itself, this testimony sufficed to support a reasonable jury's finding of obstructive intent.

2. *Evidentiary Rulings*

Sardana appeals three evidentiary rulings by the district court: (1) the admission of an out-of-court statement by Ms. Sardana to State Department employee Nyda Budig; (2) the preclusion of Sardana's testimony regarding legal advice he received from an Indian attorney; and (3) the exclusion of evidence of alleged personal misconduct by Ms. Sardana. We review these evidentiary rulings deferentially for abuse of discretion, *see United States v. Abreu*, 342 F.3d 183, 190 (2d Cir. 2003), and conclude that there was no abuse in this case.

Allowing Ms. Budig to testify to an out-of-court statement by Ms. Sardana about her difficulty contacting her daughter in India was permissible background to Ms. Budig's own actions. *See Ryan v. Miller*, 303 F.3d 231, 252-53 (2d Cir. 2002). The court's failure to give a limiting instruction did not prejudice Sardana given that Ms. Sardana testified directly to the same facts and was subject to cross-examination. *See generally United States v. Reyes*, 18 F.3d 65, 70-71 (2d Cir. 1994).

Neither did the district court abuse its discretion in refusing to allow Sardana to testify to responses he may have received from an Indian attorney to e-mail inquiries about bringing his daughter to India to pursue a custody action. The singular value of such evidence was to support an argument that Sardana believed his conduct was lawful. *See generally United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989). In fact, Sardana himself was allowed to testify at length about his legal research, his communication with Indian counsel, and his conclusion that his actions in removing his daughter from the United States to India were legal. IPKCA, however, does not require proof that defendant knew his conduct

was against the law; its *mens rea* requirement is simply that a defendant remove a child from the United States with the intent to obstruct the proper exercise of parental rights. *See generally United States v. Remini*, 967 F.2d 754, 757 (2d Cir. 1992) (holding reliance on advice of counsel irrelevant to contempt conviction because the law contained no requirement that "defendant be shown to have known of, and intended to violate, the statute which makes it a crime to consciously disregard an order of the court" (internal quotation marks omitted)). Because Sardana admitted precisely this intent in his trial testimony, his personal belief that his conduct was lawful, whether a product of his own research or of any advice he may have received from an Indian attorney, was irrelevant to culpability. For this same reason, we reject Sardana's challenge to the district court's charge, which did not instruct the jury on an advice-of-counsel defense.

Finally, the district court did not abuse its discretion in excluding evidence suggesting that Ms. Sardana was unfit to be a custodial parent. Such evidence might have been relevant if Sardana had pursued a custody challenge against his wife in New York courts. It could not, however, justify his removal of their child from the United States to India in order to obstruct his wife's exercise of parental rights. *See United States v. Amer*, 110 F.3d at 880-82.

3. *Jury Charge*

Sardana faults the district court's jury charge for (1) instructing, as a matter of law, as to Ms. Sardana's parental rights; and (2) failing to charge an advice-of-counsel defense. Reviewing the jury charge *de novo*, *see United*

States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004), we find no error.

We have already rejected Sardana's second point in our discussion of his evidentiary challenges. As for the first point, we preliminarily note that the district court correctly charged the jury that Sardana could not be convicted unless it was convinced beyond a reasonable doubt that he had acted with intent to obstruct his wife's parental rights. Sardana's intent was a disputed issue of fact for the jury to resolve, and properly submitted for its consideration. But the existence of his wife's parental rights was a matter of law. Once the trial judge instructed the jury on the rights accorded a biological mother under New York law, there simply was no question of fact regarding parental rights that required jury resolution. Thus, we conclude that there was no error in the charge.

4. *Adjustment for Acceptance of Responsibility*

Sardana faults the district court for denying him "acceptance of responsibility" consideration. *See* U.S.S.G. § 3E1.1. A sentencing court's determination of the issue of acceptance is accorded "great deference on review", *see id.* cmt. n.5, and "will not be disturbed unless it is without foundation." *United States v. McLean*, 287 F.3d 127, 133-34 (2d Cir. 2002) (internal quotation marks omitted). That is not this case.

Section 3E1.1 consideration is generally not available to defendants who put the government to the burden of proof at trial. Sardana submits that his case falls within an exception for defendants who "go[ ] to trial to assert and preserve issues that do not relate to factual guilt." U.S.S.G. § 3E1.1, cmt. n.2. It is doubtful that Sardana falls within this excep-

tion. First, as the district court observed, Sardana's stubborn refusal to acknowledge that his conduct was criminal persisted after verdict and through his pre-sentence interviews. In any event, Application Note 2 indicates that the acceptance of responsibility exception for defendants who go to trial often depends on pre-trial statements and conduct acknowledging the misconduct. *See id.* The record is devoid of such evidence. Accordingly, we uphold the district court's refusal of § 3E1.1 sentencing consideration.

In sum, because we find all of Sardana's points on appeal to be without merit, the district court's December 4, 2003 judgment of conviction is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

/s/ LUCILLE CARR 6/16/04
By Lucille Carr Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-1742
Filed: August 2, 2004

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of August, Two Thousand and Four.

Before: Hon. Joseph M. McLaughlin
Hon. Reena Raggi
Circuit Judges
Hon. Richard Holwell,
*District Judge**

UNITED STATES OF AMERICA,

Appellee,

v.

SANJAY R. SANDANA,

Defendant-Appellant.

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* The Honorable Richard Holwell of the United States District Court for the Southern District of New York, sitting by designation.

IT IS HEREBY ORDERED that the motion to stay the mandate is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
by

/s/ ARTHUR M. HELLER
Arthur M. Heller
Motions Staff Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 02 CR 1311 (ILG)

UNITED STATES OF AMERICA,

Plaintiff,

v.

SANJAY SARDANA,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The defendant was convicted, after a trial by jury, of violating 18 U.S.C. § 1204, which provides in relevant part that:

> (a) whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined . . . or imprisoned . . . or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) the term "parental rights," with respect to a child, means the right of physical custody of the child—
>
> . . .

> (B) whether arising *by operation of law*, court order, or legally binding agreement of the parties. (emphasis added).

Paragraph (c) provides for three specific affirmative defenses, neither one of which is applicable here nor were they claimed to be.

The defendant was sentenced to a term of imprisonment for ten months, five months to be served in the custody of the Bureau of Prisons and five months in home detention as a condition of supervised release. The defendant was released on bail pending notification by the United States Marshal of the date upon which he should voluntarily surrender.

A notice of appeal from his conviction and sentence was timely filed, and before the Court is his motion pursuant to 18 U.S.C. § 3143(b) which provides in relevant part:

> (b) Release or detention pending appeal by the defendant . . . (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal . . . be detained, unless the judicial officer finds—
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

The statute thus requires the district court to find before granting bail pending appeal:

(1) that the defendant is not likely to flee or pose a danger to any other person or the community;

(2) that the appeal is not for purpose of delay;

(3) that the appeal raises a substantial question of law or fact; and

(4) that if a substantial question is decided in favor of the defendant on appeal, it is likely to result in reversal or a new trial.

The factor that is decisive of this motion is whether the appeal raises "a substantial question of law or fact." The Court, in *United States v. Randell*, 761 F.2d 122 (2d Cir. 1985) (Feinberg, J.), resorted to three cases which had previously addressed that factor: *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985); and *United States v. Handy*, 753 F.2d 1487 (9th Cir. 1985), and wrote, at 125:

> The *Miller* court defined a substantial question as "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful." 753 F.2d at 23. *Giancola* held that a substantial question "is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." 754 F.2d at 901. *Handy* defined substantial as "fairly debatable." 753 F.2d at 1490. We do not believe that these definitions of "substantial" differ significantly from each other, but if we were to adopt only one, it would be the language of *Giancola*.

If the court finds that a substantial question is raised on appeal, it must then decide whether the question is "so integral to the merits of the conviction . . . that a contrary appellate holding is likely to require reversal or a new trial," citing *Miller*, *supra*, 753 F.2d at 23. Absent a finding of a substantial question, this second finding is superfluous.

At an initial hearing on the motion, Judge Learned Hand's oft-cited belief that above the portal of every courthouse in the land should be engraved the immortal words ascribed to Oliver Cromwell, "think, I beseech ye in the bowels of Christ that ye may be mistaken," was perhaps too heavily impressed upon my consciousness and cautioned against the hubris of deciding the merits of an appeal from my own trial rulings. Upon reflection, however, it became clear that such timidity was to surrender a determination § 3143 required the district court to make, and that to avoid making it would result in granting bail in most

cases pending appeal, excepting those in which it could not be in accordance with § 3143(b)(2).[1]

The defendant has specifically identified the questions which he believes are substantial and which require that his motion be granted. Each will be considered in turn:

A. (1) *No Court Order Awarding Custody Was Flouted by the Defendant.*

It is his view, in this regard, that in prosecuting him, the government intended to extend the reach of *United States v. Amer*, 110 F.3d 873 (2d Cir. 1997), in which the biological mother had obtained an order from the Family Court in Queens awarding her full custody of the children her husband flouted by removing them to Egypt.

That view is an assertion of the plainly indefensible view that a natural parent must first obtain a court order declaring that he or she has parental rights vis-a-vis his or her child. That view also ignores the plain reading of § 1204, which defines "parental rights" as meaning the right to physical custody of the child arising by operation of law." That view also ignores the plain reading of *Amer* to the effect that ". . . there is no confusion under New York law that Mona, as the biological mother, enjoys the right to physical custody of her children unless and until this right is terminated." Indeed, the defendant, making reference to N.Y. Dom. Rel. Law § 81, acknowledges that right, and acknowledged it in his testimony as well. (Tr. at 227).

[1] In *Spector Motor Service, Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943), Judge Hand also wrote: "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine as best it can, what would be the event of an appeal in the case before it."

In light of the foregoing, it would be and is, superfluous to add that the defendant acknowledged being advised by a judge of the Family Court that "any attempt to remove this child from this jurisdiction without the mother's consent is going to be dealt with very harshly" (Tr. at 221), and that there was an outstanding warrant for his arrest. (Tr. at 237).

(2) *The Defendant Promptly Moved in a Court of Law to Vindicate Custody Rights* and

(3) *The Complaining Spouse Participated in the Legal Forum Selected by the Defendant.*

To respond to those grounds as raising "substantial" questions would, in my view, be to dignify them and, by implication, suggest that they are meritorious and warrant a response. At the risk of both, I venture to believe that no court would find that § 1204 was not violated where the defendant, by deceiving her (Tr. at 216) and without her consent, removes a child from the home and custody of her mother and travels to India, a 15 hour flight (Tr. at 232), and institutes a proceeding in an Indian court not to "vindicate custody rights" as he would have it, but because he was concerned that a United States court would find in her favor. (Tr. at 227-29). I would also venture to believe that no court would find § 1204 was not violated because the mother was compelled to fly to India for fear that her rights would be adversely affected by an Indian court in her absence.

I would also note that among the affirmative defenses specifically provided by § 1204, neither the institution of a proceeding by the offending spouse, nor the appearance in such a suit by the victim spouse is mentioned.

(4) *No Attempt Was Made to Secrete the Couple's Child from Appropriate Access to the Parent.*

This ground is as flawed as are (2) and (3) and, in addition, is belied by the record. Not only had the defendant lied to the mother that he would return the child the same day that she permitted him to visit with her by spiriting her to India without her consent, he did not tell her where he was taking the child. She did not learn that he was in India until three days later, after calling the police and his father in Canada, and hearing from him five or six days later. (Tr. at 55-58).

I venture to believe that no court would hold that § 1204 was not violated where a defendant unlawfully removed a child half-way around the world and then advised the mother that she can come there if she wished to have access to her child.

B. Erroneous Admission of Hearsay.

The hearsay complained of, testimony by Nyda Budig, Chief of the American Citizens Service Unit of the United States Embassy in India, that Mrs. Sardana had once told her that she wasn't allowed to speak with her daughter, is surely harmless. Mrs. Sardana had testified to that fact extensively. (*See, e.g.*, Tr. at 66-69).

C. The Court's Charge.

The defendant alleges that the Court erred when it instructed the jury as follows:

> I must instruct you as a matter of law that Parul Sardana, the biological mother of Siena, at all relevant times had the right to physical custody of her

> child unless and until that right was terminated, and it never was.

Tr. at 314.

It is not, and never was, disputed that Parul Sardana was the mother of Siena; that she had parental rights "by operation of law," and that those rights were never terminated. That such charge was not erroneous was recently decided by *United States v. Fazal-Ur-Raheman-Fazal*, 2004 WL 93006 at *8 (1st Cir. Mass. 2004), a case virtually on all fours with this one.

D. Exclusion of Complainant's Misconduct.

The defendant unsuccessfully sought to elicit testimony that Mrs. Sardana had "a close, personal relationship" with a male companion at a time while still married to the defendant. Not only was that evidence irrelevant, but was properly excluded in accordance with Rule 611(a)(3) of the Federal Rules of Evidence.

E. Exclusion of Reliance on Legal Advice.

The record makes very clear the defendant's assiduous avoidance of obtaining the advice of a New York lawyer familiar with New York law, relying instead upon his own uninformed research and upon Indian counsel. In addition to being irrelevant, it is not an affirmative defense explicitly provided for by § 1204(c).

In sum, the defendant has not carried the burden of persuasion which is his, and the Court finds for all the foregoing reasons, that there is no substantial question of law or fact which would even arguably warrant granting this motion, that his appeal is for the purpose of delay; and it is hereby denied.

His request to extend the date for his voluntary surrender to February 28, 2004, to permit his appeal from this Order is granted.

Dated: Brooklyn, New York
January 26, 2004

/s/ I. LEO GLASSER
I. Leo Glasser

Copies of the foregoing were sent to:

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